

No. 00-1845

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**

NOV 1 2000

LEONARD GREEN, Clerk

JOHN TESMER; CHARLES CARTER; ALOIS  
SCHNELL, on behalf of themselves and all  
similarly situated individuals; ARTHUR M.  
FITZGERALD; MICHAEL D. VOGLER,

Plaintiffs-Appellees,

v.

JENNIFER M. GRANHOLM, Attorney General;  
JOHN F. KOWALSKI, Judge; WILLIAM A.  
CRANE, Judge; LYNDAL HEATHSCOTT,  
Judge, in their official capacities, individually and as  
representatives of a class of similarly situated  
circuit court judges;

Defendants,

DENNIS C. KOLENDA, Judge, 17th Circuit Court  
of the State of Michigan,

Appellant.

ORDER

Before: GUY, SUHRHEINRICH, and MOORE, Circuit Judges.

This is a civil rights action challenging the practice of certain state court judges to deny appointed counsel to indigent defendants who have pled guilty or nolo contendere and seek leave to appeal. The action also challenges a newly enacted statute implementing that policy. On March 31, 2000, the district court entered an order declaring that the policy and statute were unconstitutional. On June 30, 2000, the district court granted an injunction, enjoining Judge Heathscott, a defendant, and Judge Kolenda from violating the March 31 declaratory judgment. Judge Kolenda appeals and now moves for a stay of the injunction against him pending appeal. The plaintiffs oppose the motion for a stay.

Although Judge Kolenda did not initially move for a stay pending appeal in the district court, he argues that it is not practicable to ask district judge to stay her ruling because she made it "abundantly clear" that she expects all state court judges to comply with the injunction. See Fed. R. App. P. 8(a)(2)(A)(i). We will consider the merits of the motion for a stay, balancing the following factors: 1) whether the petitioner has demonstrated a likelihood of success on the merits; 2) whether the petitioner will be irreparably injured in the absence of a stay; 3) whether the issuance of a stay will substantially injure other interested parties; and 4) where the public interest lies. *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

Judge Kolenda raises a substantial appellate issue in his challenge to the application of the district court's March 31 declaratory ruling to judges who are not parties to the action. The plaintiffs maintain that certain indigent defendants will be deprived of counsel in seeking leave to appeal if this court grants the requested stay. However, we conclude that a balance of the applicable factors favors the issuance of the requested stay.

The motion for a stay pending appeal is **GRANTED**, and the June 30, 2000, injunction against Judge Kolenda is stayed pending further order of this court.

Judge Moore would deny the motion for a stay pending appeal.

ENTERED BY ORDER OF THE COURT

  
Clerk